



IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1940

No. _____

OREGON SHORT LINE RAILROAD COMPANY, a
corporation, and SAINT PAUL - MERCURY
INDEMNITY COMPANY OF ST. PAUL, a
corporation.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals, Ninth
Circuit, in this case (R. 56) was entered on June 27,
1940, _____ Fed. (2d) _____. That decision reversed
the judgment of the District Court dismissing the complaint
(R. 44). The District Court decision (R. 36) is not offi-
cially reported.

II.

BASIS OF JURISDICTION

The basis of jurisdiction is set forth in the petition

for writ of certiorari, page 6 *supra*, in support of which this brief is submitted.

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition, pp. 2-6, *supra*, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred

1. In holding that by the provision of Section 14 of the Act of September 1, 1888, 25 Stat. 452, an absolute and unconditional liability was imposed upon the railroad company and its surety to respond in damages for the killing or maiming of an Indian, without regard to whether the company was guilty of any fault or negligence, and in holding, in effect, that the statute created a right of action for death.

2. In holding that decisions dealing with general statutes had no application in the interpretation or construction of the statute under consideration.

3. In holding that the complaint, which did not charge fault or negligence, stated a claim against the defendant upon which relief could be granted.

4. In reversing the judgment of the District Court in favor of the appellee, petitioner herein.

V.
ARGUMENT

The statute did not purport to create any new right; it simply provided for a bond to secure the payment of damages which might accrue in consequence of the violation of a legal right.

The provision in question is contained in Section 14 of the Act appearing at page 34 of the appendix hereto. The language is

"that said railway company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of ten thousand dollars for the use and benefit of the Shoshone and Bannack Tribes of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure of the railway company to affect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho * * *".

The document to be considered is not a layman's agreement but a piece of legal draftsmanship drawn in the Interior Department (R. 14). The language therefore should be given its usual legal significance.

Old Colony R. Co. vs. Comr's., 284 U. S. 552,
560;

Kepner vs. United States, 195 U. S. 100, 124;

United States vs. Merriam, 263 U. S. 179, 187;

Westerlund vs. Black Bear Min. Co., 121 C.C.A.
627, 203 Fed. 599, 605;

McCool vs. Smith, 1 Black 459.

A statute is not to be construed as making any innovation upon the common law which it does not fairly express.

Shaw vs. Merchants Nat'l. Bank, 101 U. S. 557;

T. & P. R. Co. vs. Abilene Cotton Oil Co., 204
U. S. 426, 436-437.

U. S. vs. Oregon Short Line Railroad Co. R. 41.

A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain.

Burnet vs. Guggenheim, 288 U. S. 280.

Where there is no ambiguity in the words of a statute there is no room for construction.

Helvering vs. City Bank Farmers Trust Co.,
296 U. S. 85;

United States vs. Missouri Pac. R. Co., 278 U. S.
269.

“‘Damages’ is the sum of money which the law awards or imposes as pecuniary compensation, recompense or satisfaction for an injury done or a *wrong*

sustained as a consequence either of a breach of a contractual obligation or tortious act."

15 Am. Juris. 387, Sec. 2, "Damages," citing U. S. Steel Prod. Co. vs. Adams, 275 U. S. 388.

An examination of Section 14 of the Act at once discloses that the case falls within the rule of law last above cited. The first sentence of the section is

"that said railway company shall execute a bond,"

the purpose of the bond being

"for the due payment of any and all damages which may accrue."

Damages do not accrue without the violation of a legal right. Here the word is used as a noun. The District Court so recognized it and the appellate court reversed this ruling. That the word was intended to be used as a noun to signify the pecuniary compensation accruing in consequence of a wrongful act follows from the use of the word "accrue" and from the further fact that a bond is given to secure their payment. If it had been intended to use the word in the sense of injury, as distinguished from damages, the word "accrue" would not have been used in association therewith, nor would it have been provided later in the same section

"the *damages* in all cases in the event of failure of the railway company to affect an amicable settlement with the parties in interest to be recovered in any court of

the Territory of Idaho having jurisdiction * *".

"In the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined."

Pampanga Sugar Mills vs. Trinidad, 279 U. S. 211, 218.

The word "damages" as used in both instances, both according to ordinary rules of grammar and legal significance, means the compensation to be recovered for a wrongful act. A frequent situation of one suffering an injury or being damaged without the right to recover damages is that of *damnum absque injuria*, of which *Taylor et ux vs. C. M. & St. P. R. Co.*, 85 Wash. 592, serves as an illustration. There the court held:

"The constitutional provision that no private property shall be taken or damaged without just compensation does not change or lessen the force of *damnum absque injuria*, and property is not 'damaged' within such provision except by some unlawful act, omission, or negligence amounting to an actionable wrong."

See also:

City of North Vernon vs. Voegler, 103 Indiana 314;

Carroll vs. Rye Twp., 13 No. Dak. 458;

West Virginia Trans. Co., vs. Standard Oil Co., 50 West Va., 311.

An injury does not "accrue"; it is an event from which damages accrue when a legal right has been violated.

Bennett vs. Thorne, 36 Wash. 253.

At common law no damages were collectible for death, even by wrongful act.

Mobile Life Insurance Co., vs. Brame, 95 U. S. 754;

The Harrisburg, 119 U. S. 199.

The violation of a statutory, or other, obligation, does not create liability unless such violation is a proximate cause of the injury.

Wheeler vs. O. R. & N. Co., 16 Idaho 375;

Southern R. Co., vs. Walters, 284 U. S. 190, 194;

U. S. vs. Oregon Short Line RR Co., (R. 40);

Jennings, et al., vs. Davis, 109 C.C.A. 451, 187 Fed. 703.

The fact alone that an act of defendant was in violation of a penal statute does not afford ground for the recovery of damages by a third person, unless such act was also the proximate cause of the injury complained of.

Jennings vs. Davis, 109 C.C.A. 451.

This is true with respect to violation of the Dram Shop Act.

Shugart vs. Eagan, 83 Ill. 56;

Tetzner vs. Naughton, 12 Ill. Ap. 148;

Dudley et al., vs. State, 40 Ind. App. 74.

Brief comment may be made concerning the opinion of the Circuit Court of Appeals. The principal opinion did not discuss and does not appear to have considered any of the propositions of law above presented. It expressly rejected them, stating at the end of the opinion, "Cases dealing with general statutes have no application." (R. 67). It first discussed the question of the power which Congress *possessed*, omitting discussion of the power that Congress *exercised*, as disclosed by the language employed, and expressed the opinion that Congress possessed the power to provide that the railroad company should be liable in damages for injuries to Indians regardless of fault. That, however, does not answer the question as to whether Congress, by the language used, exercised such power.

In place of considering or applying any of the rules of statutory construction which were cited by your petitioners either to that court or to this court upon the presentation of our petition, the court applied the rule announced in *Alaska Pacific Fisheries vs. United States*, 248 U. S. 78, to the effect that

"statutes passed for the benefit of dependent Indian tribes or communities are liberally construed, doubtful expressions ordinarily being resolved in favor of the Indians." (R. 60-61)

Thereupon the court proceeded upon that basis to resolve

all doubts in favor of the respondent herein. That constituted a misapplication of the rule announced in the Alaska Pacific Fisheries case, which involved a controversy merely between the United States and the Indians. In disposing of the question of the fishing rights of the Indians in question, the court, at the end of its opinion in favor of the Indians, said:

"This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choate vs. Trapp*, 224 U. S. 665, 675, 56 L. Ed. 941, 32 Sup. Ct. Rep. 565, and cases cited."

This requires an analysis of *Choate vs. Trapp*. That suit involved a contention by 8,000 Choctaw and Chickasaw Indians who held land in Oklahoma under grants which contained provisions that the lands should be non-taxable for a limited time. After the issuance of the patents to the Indians Congress passed a general act removing restrictions against sale of the land by the Indians and providing that in such event the tax exemption should cease to exist, whereupon the state of Oklahoma undertook to tax the lands, and, based upon the statutes of the United States and treaties which expressly provided that each member of the tribe should have allotted to him a share of the land, all of which "shall be nontaxable while the title remains in the original allottee," and that the patents issued to such allottees "should be framed in conformity with the provisions of the agreement," the court held on the plain language of the patents and the statutes that the land was

not subject to taxation by the State of Oklahoma. There the court, contrasting tax exemption granted by states where the state received nothing and the beneficiaries of the exemption gave nothing for the provision of the law allowing such exemptions, said:

“There was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as the state chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.

“But in the *government's* dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the *United States*, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. * * *”
(emphasis supplied)

The language as applied to the facts of the case was appropriate, and upon the facts of the case there could be no question but what the court was fully warranted in arriving at the conclusion that under the language employed the tax exemption should be sustained.

Neither of the foregoing decisions, however, are authority for applying to a third party the rule which the government there applied in its dealings with its wards, and such a rule has never been applied by this court in controversies between Indians and persons not standing in the special

relationship which the United States bears to its Indian wards.

The principal opinion also resorts to the doubtful expedient of citing another act of Congress granting a different right of way to the Utah and Northern Railroad Company, which provides that the railroad company shall pay all damages which the Indians may sustain on account of fires originating by or in the construction or operation of such road (R. 61). The difficulty with that argument is that that act has never been judicially interpreted, but if it should be, it might well be held that in that case, because of the language employed, an unconditional liability was imposed by Congress, but because of the difference of the language employed it would still be no guide as to what Congress intended and what liability it in fact imposed by the enactment of the statute upon which the present suit is based.

A specially concurring opinion was written by one of the circuit judges, in which opinion it was sought to support the respondent's contention by quoting the popular definition of the word "damage" appearing in Webster's New International Dictionary, Second Edition, in contrast to the legal meaning appearing in Bouvier's Law Dictionary (Rawls 3rd Rev.). Upon investigation it appears that Webster's Dictionary gives the definition of damages as employed in law as follows:

"4. *Pl. Law.* The estimated reparation in money for detriment or injury sustained; compensation or satisfaction imposed by law for a wrong or injury

caused by a violation of a legal right. Damages are either *substantial* or *nominal*, according to whether there has been actual or merely nominal loss. (Cf. *Damnum Absque Injuria*.) Legal damages are limited to those which are the natural and proximate result of the wrong done. Some do not include under the term *damages* the amount sued for upon a liquidated claim, as in an action for recovery for a sum of money due upon a bond, contract or quasi contract.

“‘Direct’ or ‘general’ *damages* are those which are the necessary and immediate consequence of the wrong, while ‘indirect’ or ‘special’ *damages* are sometimes granted in respect of its remoter consequences.”

This definition and the rules of statutory construction announced by this Court were wholly disregarded and set aside in the opinion of the Circuit Court of Appeals. Given their proper interpretation and application, it is respectfully submitted that by the plain language of the statute it is clear that Congress did not intend or undertake to impose absolute and unconditional liability upon the railroad company for the death of an Indian resulting from collision occurring without fault or negligence on the part of the railroad company, the sole proximate cause of which may have been the act of the Indian in driving upon a railroad track in the daytime in front of an approaching train in plain view and in disregard of its signals and other warnings received by him. It is therefore respectfully submitted

that this Court should grant a writ of certiorari to review such decision, and finally reverse it.

OREGON SHORT LINE RAILROAD
COMPANY, SAINT PAUL MERC-
URY INDEMNITY COMPANL OF
ST. PAUL

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